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Published in:
e-Competitions

Publication date:
2015

Document version
Også kaldet Forlagets PDF

Citation for published version (APA):
Bergqvist, C., & Christensen, L. P. S. (2015). The Danish Supreme Court rules on State action defense and refusal to supply under Danish competition law (Copenhagen Airport Terminal A). *e-Competitions*, *2015*(77185), 1-10. [2015-II].

e-Competitions
National Competition Laws Bulletin

December 2015-II

The Danish Supreme Court rules on State action defense and refusal to supply under Danish competition law (Copenhagen Airport Terminal A)

Denmark, Unilateral practices, Refusal to deal, State action defence, Transports, Services

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Summary of the case

After a lengthy process the Danish Supreme Court finally closed the curtain in September 2015 on a potential new, and competing, terminal in Copenhagen Airport, the main Danish airport hub. A group of investors had asked the airport to grant access (a lease) to a plot of land in the airport for the purpose of building a new terminal A. Terminal A would compete with the airport in the supply of services to airlines. Copenhagen airport rejected the request which in turn lead the group of investors to complain to the Danish Competition and Consumer Authority ("DCCA"). In its draft decision the DCCA identified an obligation to grant access under EU Article 102 and the Danish equivalent. However, just before a formal decision was to be made on the matter by the DCCA, the Danish Transport and Construction Agency reversed a previous finding now holding air security regulation to be an obstacle to the application of competition law to the matter at hand. Unhappy, not only with the outcome, but also the process, the access seeking party, *Terminal A*, lodged a case before the judiciary arguing that air security regulation did not prevent the application of competition law and an order for the granting of access. This submission was not accepted by the Danish Supreme Court that moreover held EU Article 106 (2) to be applicable as a defence for Copenhagen Airport's refusal to lease the land to Terminal A. The case provides guidance on the scope of the state action defence under Danish competition law and, indirectly the application of EU Article 102 and the Danish equivalent to refusal to supply cases.

Background of the case and its long march to the Supreme Court

Presently, Copenhagen Airport is the sole provider of the full spectrum of core airport related services, including terminal services to air operators and their passengers. Since early 2008 a group of investors, using the brand *Terminal A*, had been contemplating to set up a competing terminal in

Copenhagen Airport for the purpose of offering a cheaper alternative to the existing vertically integrated operator. The project Terminal A required access (a lease) to a plot of land within the fence surrounding the airport. Moreover, terminal A would need to be linked to the remaining terminals allowing passengers to access connecting flights. For obvious reasons Copenhagen airport had limited interest in any leasing arrangements and moreover would have to assume security responsibility for the activities of Terminal A. Following unsuccessful discussions the investors logged a complaint with the DCCA in August 2008 arguing that two vertically linked markets could be identified; an upstream market for the leasing of land within the airport area and a downstream market for the offering of terminal services. Access to the second market could only be secured through the first market. Therefore, the refusal of grating access constituted an infringement of Article 102 and the Danish equivalent. Copenhagen Airport therefore should be ordered to grant access in the form of a lease of the plot of land in question.

Proceedings before Competition Authority – An infringement decision never delivered

Before carrying out its analysis of the matter, the DCCA contacted the Danish Transport and Construction Agency, the agency responsible for regulatory oversight of the air transport sector including Copenhagen Airport, for the purpose of clarifying any air security regulatory obstacles to the Terminal A project. Following some discussions between the DCCA and the Danish Transport and Construction Agency the latter came to the preliminary conclusion in May 2010 that air security regulation neither precluded the tabled project nor made competition law inapplicable. For background; under Danish competition law 'immunity' from the application of competition law is allotted to restrictions of competition which are a direct or necessary consequence of public regulation. This 'immunity' provision mirrors, but is broader in scope, than the state action defence under EU Article 106. Moreover, the power to decide whether the 'immunity' provision is applicable does not rest with the DCCA but with the responsible Minister (in the present matter the Minister of Transport and Building), that however, normally would either delegate to or coordinate the position with the designated sector regulator. Consequently, in light of this preliminary conclusion of the Transport and Construction Agency, the DCCA decided to pursue the matter further, including reviewing the refusal under EU Article 102 and the Danish equivalent. Furthermore, the preliminary decision by the Transport and Construction Agency of May 2010 was 'converted' into a final decision in January 2011, allowing the DCCA to open a formal Article 102 case against Copenhagen Airport with the aim of rendering a final decision on the matter before the end of 2011 or early 2012.

In what hardly can be described as nothing short of the 11th hour, the Danish Transport and Construction Agency in December 2011 reversed its decision of January 2011, now identifying material regulatory obstacles for the Terminal A project. More importantly, these regulatory obstacles also precluded the DCCA from pursuing the case further under competition law as the Danish Transport and Construction Agency now considered competition law inapplicable to the matter. Consequently, the DCCA had to close its case without a formal decision. Apparently somewhat discontent with the late U-turn by the Transport and Construction Agency, the DCCA in January 2012 sent its 267-pages draft decision [1] setting out its reasons for finding an infringement of EU Article 102 and the Danish equivalent to the Ministry of Transport and Building recommending amendments to the existing air security regulation. [2]

Proceedings before the judiciary – the mysterious U-turn

Equally discontent, as the DCCA, were of course the Terminal A investors. Perhaps encouraged by the draft decision of the DCCA, identifying an obligation to let the plot of land in question, and the ambiguous approach to the matter by the Transport and Construction Agency, legal action before the Danish High Court was taken to challenge the December 2012 decision. The challenge was based on the decision being "wrong" and consequently, null and void, and in violation of Terminal A's legitimate expectations as to the outcome of the matter raised by the 'favourable' January 2011 decision.

Before the Danish High Court could rule on the matter the Danish Transport and Construction Agency decided to reverse its position once again, now deciding that it had no final position on the substance matter of the case, but needed further time to consider the issue. Consequently, the Danish High Court dismissed the case in June 2014. [3] This decision by the High Court to dismiss the case was appealed to the Danish Supreme Court, the highest judicial instance in Denmark. Moreover, in July 2015 the Danish Transport and Construction Agency and the Ministry of Transport and Building, replied to the January 2012 letter from the DCCA, confirming the January 2011 decision by referring to material practical and regulatory obstacles to granting access as requested by Terminal A. Moreover and as a consequence competition law was not applicable to the matter at hand. With the final position of the Danish Transport and Construction Agency and the Ministry of Transport and Building having been established, the Danish Supreme Court could proceed to hear the arguments of the parties in September 2015 and deliver a ruling the same month.

In its ruling the Danish Supreme Court [4] makes three notable and clear conclusions:

1) Firstly, the Supreme Court found that the January 2011 decision by Danish Transport and Construction Agency did not create any legitimate expectations for the Terminal A investors as the decision was 'directed' to the DCCA and not to the investors. Moreover, the decision of the Transport and Construction Agency was subject to further consideration of a number of factors and therefore clearly of a preliminary nature. Consequently, it was from a *legal* perspective unproblematic that the Danish Transport and Construction Agency eventually took a different view on the security regulation issue than first indicated.

2) Secondly, the Supreme Court held the July 2015 decision of the Danish Transport and Construction Agency and the Ministry of Transport and Building, finding competition law inapplicable due to regulation, to be neither unreasonable nor unmerited as the Danish airport regulation does not allow for separate and independent operators of terminals. Under Danish airport regulation, reflecting the EU directive in the field, [5] a single entity is entrusted with the task of offering core airport services including operating terminals. Moreover, substantial practical issues would emerge in the event that a second operator was allowed into the airport e.g. in relation to airport security issues and division of responsibilities. In the specific case a two-party relationship had been established between Copenhagen Airports and the Danish Transport and Construction Agency that did not facilitate the setting up of a competing terminal, as Terminal A, outside the control of Copenhagen Airport. Changes to this arrangement would need to be obtained through discussions and negotiations between the parties involved. Although this is not articulated in the judgment, there would appear to be a reluctance to replace such discussions and negotiations with a competition law-based argument for ordering a change of the existing arrangement.

3) Thirdly; in light of the special tasks vested upon Copenhagen Airport its refusal to lease out the

plot of land to Terminal A could be categorised under Article 106 (2), thereby also providing cover against Article 106 (1) arguments. This third point of the judgment is interesting. A significant part of the parties' oral submissions were focused on this point.

Consequently, Terminal A's claim was dismissed and the curtain finally drawn on further legal action, referring the parties to seek either a negotiated settlement or push for political intervention. As an interesting detail; in light of the late reply to the request from the DCCA, and perhaps also the U-turns, all parties were ordered to cover their own cost, including the winning parties. Under Danish law the loosing parties would normally be ordered to compensate the winning parties and cover their costs.

Comments on the case and possible interpretations

The case could in fact be viewed as two equally interesting cases: One case on the state action defence in Danish competition law and one case on the refusal to supply doctrine under Danish Competition law. Below comments on both issues are offered including substantial discussions of the legal analysis by the DCCA and the refusal to supply issue. [6]

The state action defence in Danish competition law

Under Danish competition law 'immunity' is allotted to restrictions originating from other regulation. Such 'immunity' prevents the DCCA from applying competition law including EU competition law. The 'immunity' provision mirrors EU Article 106 but is broader in scope [7]; not only does it offer full 'immunity' even where a commercial freedom has been restricted but in addition the 'immunity' exception is also not subject to proportionality requirements as seen in EU practice. Perhaps even more notable is the fact that the power to decide whether the 'immunity' exception can be relied upon rests with the responsible ministry. The DCCA must respect the minister's decision and its only course of action is to make a recommendation to the minister for amendments of the legislation in question. [8] As the 'immunity' exception is neither subject to review by the DCCA nor any proportionality test there is no defence comparable to Article 106 (2) in Danish competition law. This defence would be considered 'internalized' into the immunity system. However, Article 106 (1) remains applicable allowing the EU Commission or a Danish court to review a matter and in principle find an infringement making the Article 106 (2) discussion relevant in relation in this scenario.

In its review of the July 2015 decision the Danish Supreme Court demonstrated a high level of willingness to check the substance matter of a 'immunity' decision including practical obstacles such as security issues and whether national and EU regulation singles out terminal services as separate from other (core) airport activities. In finding that this was not the case, and in light of the concession granted to Copenhagen Airport further vested rights and obligations upon the airport (including the right to decide on the expansions of terminals), the July 2015 decision was upheld. As a consequence of this competition law was considered inapplicable. As mentioned, the Court did not rest there but also concluded that as a consequence of the special obligations vested upon Copenhagen Airport, and the air security issue, Copenhagen Airport's decision not to let the land could be subsumed under Article 106 (2) thereby closing the curtain on any EU Article 106 (1) discussions. An interesting conclusion as there is no analysis on the application of Article 106 (1) in the ruling. The decision by the Danish Supreme Court to address the Article 106 (2) point without a

lengthy analysis on Article 101 (1) gives rise to different possible readings. One, perhaps less likely, reading is that the Danish Supreme Court will automatically consider Article 106 (2) in relation to any decision on the non-application of competition law due to regulation. Another, and perhaps more plausible reading, is that the Danish Supreme Court *ex officio* found it necessary to consider Article 106 in light of the nature of the strict security regulation of the activities in question. As no reasoning is provided in the judgment, it is not possible to come to a clear conclusion on this point. However, despite a clear decision from the Danish Transport and Construction Agency and the Ministry of Transport and Building, precluding the DCCA from reviewing the matter, both parties felt compelled to defend their respective positions before the Supreme Court by offering substantial evidence and arguments about the relevant practical and regulatory circumstances, e.g. on security. This indicates that the second reading of the case is more plausible and thereby also that the judgment should be read to limit the public authority's scope under Danish law to make competition law inapplicable. This would be welcome as existing precedents are somewhat ambiguous and uncoordinated across sectors and areas of activities. In line with this the OECD [9] recently recommended Denmark to consider changing the law and to adopt a clearer and coherent approach.

The draft decision from the DCCA

As a consequence of the U-turns of the Danish Transport and Construction Agency no final decision were rendered on the substance matter by the DCCA. However, the draft decision of November 2011 and covering 267 pages offers some interesting insight into how the case could have ended had the DCCA been allowed to proceed to formal decision.

Firstly, the draft decision's product market definitions and finding of Copenhagen Airport as a dominant player involves some interesting considerations. The DCCA starts by making a distinction between primary and secondary airports – the latter being regional airports - followed by identifying a third category of airports predominantly relevant for 'taxi' flights and flight schools. [10] Primary airports are normally located next to a major city (e.g. Copenhagen) and service direct and transfer customers, while secondary airports normally are found outside the major cities offering a cheaper alternative to the primary airports or focusing on regional customers and transport. Moreover a possible distinction is considered between point-to-point traffic - where only airports within a limited geographical area are an option for the traveller - versus transfer traffic where also more distant airports could be substitutes [11] and for which the primary airports serve as hubs. Of more direct relevance for the Terminal A case the DCCA identifies a number of vertically and horizontally linked products markets [12] including a) ground handling, b) aeronautic services and c) commercial services. Ground handling services (a) have specifically been subject to unbundling regulation [13] and hence subject to competition. Commercial services (c) are services such as tax free shopping, parking, restaurant services etc., normally served by third party under a lease agreement with the airport, and hence also open to competition. By contrast aeronautic services (b) such as offering landing strip services, directing and parking of planes, providing terminal space and security services, fall within the core activities of an airport. Historically these services have been provided by the airport as the services are associated with the actual traffic control (i.e. directing airplanes between airports and landing and taking off). However, the actual traffic control services are normally supplied by a governmental entity operating within and separate from the airport.

The described market definitions in the DCCA's draft decision are in line the EU precedents [14] and perhaps more importantly also accepted as correct by market participants, including Copenhagen

Airport. However, the DCCA then moves on and sets out a somewhat unclear distinction between: [15]

a) the provision of so-called landing strip services. Landing strip services are aeronautic services and are described by the DCCA as access to and use of infrastructure. The landing strip services are services to airlines (and their passengers) encompassing access to (and use of) of the landing strip for landing, take-off, parking of aircrafts and access roads as well as the provision of security measures in connection with the landing strips, and

b) the provision of terminal services. Terminal services are both aeronautic and commercial services. Terminal services are services to airlines (and their passengers) which are also customers of landing strip services. Terminal service encompass (i) (access to) the terminal building (the "shell"), letting of space in the terminal to restaurants and shops [16], (iii) (access to and use of) facilities in the terminal by the airlines, (iv) (use of) baggage facilities, (v) (use of) check-in counters as well as self-service check-in facilities, (vi) the provision of IT services to airlines and (vii) parking.

The DCCA notes that a pre-condition for providing terminal activities is to have access to the landing strips. This can be achieved by obtaining access through the leasing of a plot of land from the airport. Copenhagen Airport argued in favour of an alternative product market definition, namely to view the provision of landing strip and terminal service as one single service market rather than separate upstream and downstream markets. [17] To counter the market definition suggested by Copenhagen Airport and in support of its own market definition the DCCA referred to domestic and non-domestic examples e.g. New York (JFK) where a third party had at least been considered to be allowed to operating a competing terminal, [18] making it possible to distinguish two clearly separate service markets, currently bundled by Copenhagen Airport. Moreover, the draft DCCA decision included references to 2008 and 2009 UK studies [19] contemplating pro and cons of allowing for or mandating independent terminals. Lastly, the draft DCCA decision noted that freight carriers, also operating out of Copenhagen Airport, do not request terminal services, only airport facilities, [20] which would indicate two separate products.

While not discussed directly before the Danish Supreme Court the Danish Transport and Construction Agency and the Ministry of Transport and Building did not appear to agree with the arguments advanced by the DCCA in this regard. In contrast both the agency and the ministry essentially argued in favour of viewing the services offered by Copenhagen Airport as a single integrated product and furthermore argued that the market had no room for specialized operators of terminal services. Moreover, in their submissions the agency and the ministry referred to the ’market definitions’ or market description methodology in the EU directives in the field. Of course, these arguments as regards market definition do not bind the DCCA. Moreover, competition law must always be applied to the actual market circumstances at hand. However, presuming the arguments of the Danish Transport and Construction Agency and the Ministry of Transport reflect market realities, it does indicate the single integrated product market as the ’correct’ market definition - also under competition law – which in turn would indicate a flaw in the draft decision. As no final decision was rendered, the issue remains somewhat unresolved.

Secondly, in relation to the geographical scope of the market in question the DCCA opens by concluding that it would not be relevant to consider alternative supplier of airport facilities in Copenhagen Airport, as there would be none, but rather alternative airports - which compete with

Copenhagen Airport for passengers and air carriers. [21] In the specific case Terminal A was only interested in servicing point-to-point traffic, and not transfer traffic, making it relevant to consider different secondary airports in Denmark as alternatives from a passenger perspective. Based on extensive customers surveys it was concluded that Copenhagen Airport attracts passengers from Greater Copenhagen, the surrounding islands and Southern Sweden but not passengers from the region of another major Danish airport (Billund) located approximately 250 km from Copenhagen. [22] This part of the analysis involved estimating that passengers were willing to travel up to 97 minutes which was somewhat less than the 2 hour accepted in some of the previous EU precedents. Against this background Copenhagen Airport were held to be dominant with an overall market share calculated on the basis of users/passengers of between 90.7 % and 100 % depending on the inclusion or exclusion of some of the secondary airports. [23]

Thirdly, and perhaps most interestingly, the DCCA identified an infringement of EU Article 102 and the Danish equivalent. While this to some extent could be considered as a 'mechanical' consequence of having identified two separate product markets and having identified Copenhagen Airport as holding a (super) dominant position, this is done with a 'twist' by the DCCA. Copenhagen Airport is the only property owner 'within the fence' surrounding the airport. However, the airport's core activity is not the letting of property but the offering of what in the case is referred to as aeronautic services. Moreover, the offering of aeronautic services (in contrast to leasing out property) can reasonably be considered the core activity of all commercial airports, as the directing of flights at landing and take-off normally would be managed by a government entity, making all other services of an auxiliary nature. In contrast to 'traditional' refusal to supply cases, Copenhagen Airport therefore did not foreclose a potential downstream or upstream competitor for the purpose of reserving an auxiliary market for itself but rather a direct competitor. The refusal to supply could be said to have a horizontal scope rather than the traditional vertical foreclosure.

It is not clear if this element was separately considered by the DCCA or whether- perhaps influenced by the fact that EU practice remains somewhat unsettled on the matter – the DCCA did not consider this as material. The draft decision makes no references to the distinction between horizontal versus vertical foreclosure indicating that the DCCA decided not to address this point. In support of finding an abuse the DCCA then cites [24] the fundamental principles originating from *Telemarketing* [25] that a dominant undertaking cannot reserve an ancillary activity on a neighbouring but separate market for itself. Having established this additional substantive analysis on the abuse point is provided using the principles of other EU cases such as *Microsoft* [26] and *Bronner* [27] including the condition of two separate markets of which one can be considered as essential for the access to the other giving rise to a substantial risk of foreclosure in the absence of alternative supplies. [28] By contrast the DCCA did not make reference to EU cases such as *BP* [29] and *United Brands* [30] that would indicate that a dominant undertaking has a right to defend its interests against a direct competitor. Based on these cases a distinction between vertical and horizontal refusals to supply could have been made. If this distinction had been accepted and followed the Terminal A case would most likely have had to been assessed under the latter and more restrictive doctrine. [31] As no final decision was rendered on the case, it remains unclear how the case eventually would have ended op. This deprives us of a potentially very interesting precedent, in particular if the European Court of Justice had been asked to provide guidance on whether a distinction should be made between vertical and horizontal refusals to supply under Article 102. In the absence hereof it does, however, appear to be the opinion of the DCCA that no such distinction should be made.

As a fourth element of its analysis the DCCA undertook a substantial review of the potential consumer benefits from Terminal A being granted access [32] including the potential consequences for Copenhagen Airport's future prices and investments. However, the DCCA specifically noted that this element is neither required nor sufficient to identify an abuse. Nevertheless it is interesting that the DCCA included this element in its analysis.

[1] *Bilag 2 – Københavns Lufthavns A/S' leveringsnægtelse* - Draft 22 November 2011.

[2] *Henvendelse fra Konkurrencerådet til transportministeren og erhvervs- og vækstministeren efter konkurrencelovens § 2, stk. 5*. Letter dated 25 January 2012.

[3] Østre Landsrets dom af 11. juni 2014 i sag B424100F – *VGB - Airport Terminal A ApS vs. Transportministeren og Trafikstyrelsen*.

[4] Højesterets dom af 29. september 2015 i sag 109/2014 - *Airport Terminal A ApS vs. Transport og bygningsministeren samt Trafik og Byggestyrelsen*.

[5] Directive 2009/12/EC on airport charges.

[6] References are included to the Danish decision available (in Danish) from www.kfst.dk

[7] An outline of the 'immunity' exemption under Danish competition law is available in *IN-DEPTH REVIEW OF DENMARK*, OECD 16-18 June 2015, pp. 27-31 and pp.89-90.

[8] In the specific case the DCCA used this opportunity, eventually resulting in the July 2015 decision on the matter.

[9] *IN-DEPTH REVIEW OF DENMARK*, OECD 16-18 June 2015, pp.89-90.

[10] *Bilag 2 – Københavns Lufthavns A/S' leveringsnægtelse* - Draft 22 November 2011, recital 76.

[11] *Bilag 2 – Københavns Lufthavns A/S' leveringsnægtelse* - Draft 22 November 2011, recital 763-774.

[12] *Bilag 2 – Københavns Lufthavns A/S' leveringsnægtelse* - Draft 22 November 2011, recital 80-99.

[13] *Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at Community airports*.

[14] References are made to EU cases as Commission Decision of 28 June 1995 in case 95/364/EC – *Brussels National Airport (Zaventem)*, O.J. 1995L 216,p. 8-14; case IV/35.703 – *Portuguese airports*; case IV/35.767 – *Ilmailulaitos/Luftfartsverket* and the Commission Decision of 26 July 2000 in case 2000/521 – *Spanish Airports*.

[15] *Bilag 2 – Københavns Lufthavns A/S' leveringsnægtelse* - Draft 22 November 2011, recital 688-897. No clear EU cases are recited except from COMP/38.469 – *AIA SA and Olympic Fuel Company SA*, recital 82 that is indicated as giving some merits to the claim.

[16] It is unclear how the activity of letting commercial space to restaurants and shops can be

defined as a service to airlines and their passengers, which the DCCA describes as the service purchasers on the terminal service market.

[17] *Bilag 2 – Københavns Lufthavns A/S' leveringsnægtelse* - Draft 22 November 2011, recital 607-611 and 861-862.

[18] *Bilag 2 – Københavns Lufthavns A/S' leveringsnægtelse* - Draft 22 November 2011, recital 361-378 and 725-738.

[19] Frontier Economics, *Regulation of capacity investment at Stansted Airport*, March 2008 and *BAA Airports market Investigation*, Competition Council, 19 March 2009.

[20] *Bilag 2 – Københavns Lufthavns A/S' leveringsnægtelse* - Draft 22 November 2011, recital 708.

[21] *Bilag 2 – Københavns Lufthavns A/S' leveringsnægtelse* - Draft 22 November 2011, recital 903-910.

[22] *Bilag 2 – Københavns Lufthavns A/S' leveringsnægtelse* - Draft 22 November 2011, recital 145-152, 191-260 and 953- 1020.

[23] *Bilag 2 – Københavns Lufthavns A/S' leveringsnægtelse* - Draft 22 November 2011, recital 1088-1093.

[24] *Bilag 2 – Københavns Lufthavns A/S' leveringsnægtelse* - Draft 22 November 2011, recital 15-28 and 1101-1109.

[25] Case C 311/84 – *Telemarketing*, recital 27.

[26] Case T-201/04 – *Microsoft*, recital 319.

[27] Case C-7/97 – *Oscar Bronner*, ECR 1998 p. I-7791.

[28] *Bilag 2 – Københavns Lufthavns A/S' leveringsnægtelse* - Draft 22 November 2011, recital 1116-1256.

[29] Case IV/31.900, *BPB Industries plc*, O.J. 1989L 10/50. Partly overturned by case T-65/89- *BPB Industries plc*, ECR 1993, p. II-389.

[30] Case C 27/76 – *United Brands Company*, ECR, 1978, p. 207.

[31] This destination has traditionally been accepted in Danish practice as illustrated by the Competition Complaint Board decision dated 29 August 1998 – *Dansk Sportsdykker Forbund v. Konkurrencestyrelsen*.

[32] *Bilag 2 – Københavns Lufthavns A/S' leveringsnægtelse* - Draft 22 November 2011, recital 1378-1573.

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